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No. 91-321

In the Supreme Court of the United States

OCTOBER TERM, 1991

ITEL CONTAINERS INTERNATIONAL CORPORATION,
PETITIONER

v.

JOE HUDDLESTON, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE, RESPONDENT

On Petition for a Writ of Certiorari to the Tennessee Supreme Court

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.7 of the Rules of this Court, this brief is filed in response to the brief submitted by the United States as *amicus curiae*.

In its filing, the government does not take issue with the proposition that the questions presented in the petition are recurring ones of considerable importance. Nor does it deny that the Tennessee tax will both increase the cost of American exports and discourage the use of American containers. Nor, for that matter, does the government make any attempt to defend the analysis of the court below as to *any* of the questions presented. As we understand its submission—and there are elements of the government's reasoning that we frankly find opaque—the government nevertheless opposes review because it believes that the Tennessee Supreme Court could have upheld Tennessee's tax on grounds that the court below either did not advance or expressly rejected. This argument rests in equal parts on a misreading of our position and of the decision below, and on a misstatement of the controlling law. Needless to say, we do not think that the government has offered any substantial reason for this Court to deny review.

A. The Commerce Clause

1. The government begins its discussion of the Foreign Commerce Clause with the boilerplate observation that interstate commerce must pay its own way (Br. 5-6), suggesting that Itel seeks complete immunity from state taxation "on the stated ground that imposition of the tax will increase the cost of American exports." Br. 5. That suggestion misstates our position. We noted the effect of the Tennessee tax upon American commerce simply to emphasize the practical importance of the case (see Pet. 8-9)—a point that, it again bears emphasis, the government does not dispute. Our *legal* submission is that the court below erred in holding that state sales and similar transaction taxes are wholly im-

mune from attack under the Foreign Commerce Clause, even when those levies fall directly on instrumentalities of foreign commerce. See Pet. 11-16.

2. While the government does not expressly address this question, it does contend that review is unwarranted because "[t]his case is, in all of its fundamentals, a replica of *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1 (1986)." Br. 7. This contention is nothing short of mystifying. As we noted in the petition (at 11), Tennessee's sales tax on containers certainly is similar to (although more difficult to defend than) the Florida sales tax on aviation fuel at issue in *Wardair*. But the government's contention that *Wardair* controls this case is simply wrong. The Court affirmed the constitutionality of the Florida tax because, by treaty and executive agreement, "the Federal Government has affirmatively decided to permit the States to impose these sals taxes on aviation fuel." *Wardair*, 477 U.S. at 12. See *id.* at 3-4, 9-10. Here, of course, the government does not (and could not) contend that the Tennessee tax benefits from a similar affirmative federal authorization. In fact, the *Wardair* Court expressly *reserved* the question presented in this case, explaining that "there is no need for us to consider, and nothing in this opinion should be understood to address, whether, in the absence of these international agreements, the Foreign Commerce Clause would invalidate Florida's tax." *Id.* at 13.

The government similarly contends (Br. 8) that *Wardair*'s analysis demonstrates the inapplicability of *Japan Line* to this case. Again, this contention involves a patent misstatement of the *Wardair* holding. The government evidently has in mind the following statement in *Wardair*:

> In *Japan Line*, 441 U.S., at 451, we explained that Foreign Commerce Clause analysis requires that a court ask whether a state tax "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" But we never suggested in that case or any other that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.

477 U.S. at 13. That statement, of course, related to the *Wardair* Court's conclusion that the Florida tax had been affirmatively authorized by the United States. Because the United States here has, if anything, acted to preclude the imposition of state taxes on containers, the reasoning of *Wardair* says absolutely nothing about *Japan Line*'s applicability in this case.

3. While evidently recognizing that the Tennessee tax would pose constitutional problems if imposed on a foreign domiciliary (see Br. 8), the government also suggests that the levy may be upheld on the ground that Itel is domiciled in the United States; the government asserts that, "[f]or the same reasons that foreign nations possess a prior right to tax foreign-owned instrumentalities of foreign commerce, so too does this Nation and its States possess the right to tax the domestically owned instrumentalities of commerce." Br. 8-9. We certainly agree that nothing in the Foreign Commerce Clause precludes the United States from favoring foreign over domestic firms. But the government's surprising suggestion that a *state* may discriminate against citizens of other states and in favor of foreign domiciliaries does not support denial of review for several reasons.

First, the Tennessee court expressly "decline[d] to consider the domicile of the owner of the containers as relevant" (Pet. App. 8a) because it believed that a distinction between foreign and domestic domiciliaries would itself be constitutionally suspect. As a consequence, the only question presented by the Tennessee court's decision is whether, as the court held, transaction taxes (on foreign as well as domestic taxpayers) automatically escape regulation under the Foreign Commerce Clause. By urging denial of review on the ground that Itel is a United States domiciliary, the government thus is telling this Court that it need not consider the case because the court below could have upheld the tax on a ground that it in fact expressly rejected, while urging the Court to

leave intact a decision that states a rule—the *per se* validity of transaction taxes—that cannot be reconciled with the Constitution.[1]

Second, the dangers of duplicative taxation and retaliation that concerned the Court in *Japan Line* are present here, notwithstanding Itel's status as a U.S. domiciliary. As we explain in the petition (at 12-13)—and as the government expressly (albeit grudgingly) acknowledges (Br. 7 n.7)—other nations could impose use or similar taxes that effectively duplicate Tennessee's levy on sales.[2] And while the government dismisses the possibility that the risk of multiple international taxation could invalidate a state tax (at Br. 7 n.7), the Court in *Japan Line* expressly declined to decide in what "circumstances the mere *risk* of multiple taxation would invalidate a state tax, or whether this risk would be evaluated differently

[1] In making this argument, it appears that the government misunderstood the decision below. The government's statement of the case reports: "[t]he court [below] rejected petitioner's invocation of *Japan Line* * * * pointing out that * * * in this case the owner and transferor of the leased containers was a domestic corporation, not a foreign corporation subject to taxation, and taxed, by its own government." Br. 4. While the state court did "point[] out" Itel's domestic domicile, it did so only in the course of labeling that domicile legally irrelevant to the issue presented here.

[2] Somewhat inconsistently, the government also quotes *Wardair* as standing for the proposition that " 'there is no threat of multiple international taxation in this case, since the tax is imposed only upon * * * a discrete transaction which occurs within one national jurisdiction only.' " Br. 7-8, quoting *Wardair*, 477 U.S. at 9. In fact, the quoted language from *Wardair* was reciting a party's concession rather than the Court's own analysis. In any event, as we note in the petition (at 12-13 n.8), the United States itself explained the special circumstances in *Wardair* that eliminated the risk of duplicative taxation in that case: "far from being able to tax the event of sale, foreign nations could not purport to tax even the fuel itself, which typically will be consumed in international air space en route from the United States." U.S. Br. in support of prob. jur., No. 84-902, at 31. That is not the case here; as we demonstrate in the petition (at 12-13), there are a variety of duplicative taxes that could be imposed upon containers.

in foreign, as opposed to interstate, commerce." 441 U.S. at 452 n.17 (emphasis in original).

As for the prospect of retaliation by our trading partners, we noted in the petition (at 14-15) that, under Tennessee law, the tax must be separately stated on the bill submitted by the lessor to the lessee; the law also provides that the tax "shall be collected by the retailer from the consumer insofar as it can be done." Tenn. Code Ann. 67-6-502. This requirement is mandatory. See *Hooten* v. *Carson*, 209 S.W.2d 273, 275 (Tenn. 1948). Itel thus acts as a tax collector for the State. In this setting, its domicile is of little importance; the tax burden is (and by law must be) borne by its customers, 80% of whom are foreign domiciliaries. And because these customers (as well as their governments) will know that they are paying the tax, the problems of retaliation addressed by *Japan Line* are fully present here.[3]

Third, the suggestion that states may discriminate against domestic and in favor of foreign taxpayers—a contention that the government has advanced unsuccessfully in the past (see No. 78-1577, U.S. Br. at 8)—is one that has closely divided the Court and that has not yet been resolved. In *Japan Line* itself the Court reserved the question whether domestically owned instrumentalities of international commerce are subject to state taxation. 441 U.S. at 444 n.7. Justice Powell, writing for the three Members of the Court who reached the question, subsequently concluded that a state cannot discriminate against a corporation domiciled in another state and "in favor of an overseas corporation" unless it receives "explicit congressional authorization." *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 203 (1983) (Powell, J., dissenting). See *id.* at 204 n.6. And in *Zee Toys, Inc.* v. *County of Los Angeles*, 149

[3] While the government notes (at Br. 7 n.7) that no foreign nation has yet threatened retaliation because of Tennessee's tax, that is because this test case is the first in which the tax has been imposed. The government does not deny that, as we explain in the petition (at 14 & n.10), none of our trading partners taxes the transfer of containers.

Cal. Rptr. 750, 754, 755 (Cal. Ct. App. 1978), a state court held that the "exemption of goods of foreign origin" from California's ad valorem property tax, which gave goods in foreign commerce "a competitive advantage over interstate goods, is a regulation of interstate and foreign commerce in violation of the Commerce Clause." That holding was affirmed by an equally divided Court. *Sears, Roebuck & Co.* v. *County of Los Angeles*, 449 U.S. 1119 (1981). In this setting, the government is hardly advancing a noncontroversial ground in support of the judgment below.

B. The Container Conventions

In opposing review of the preemption question presented in the petition, the government asserts (Br. 9) that neither the 1972 nor the 1956 Container Convention applies here because they "relate only to customs duties on containers" and "[t]here is no reason why a convention on the subject of customs duties should be thought to relate to generally applicable sales taxes." Again, we find this submission baffling: it is manifestly inconsistent with the plain language of the Conventions, with this Court's holding in *Japan Line*—and with the government's own position in that case.

The government cites but (perhaps not surprisingly) does not quote the Conventions' definitions of prohibited "import duties and taxes." The 1972 Convention provides that the term includes "Customs duties *and all other duties, taxes, fees and other charges* which are collected on, *or in connexion with*, the importation of goods, but not including fees and charges limited in amount to the approximate cost of services rendered." 988 U.N.T.S. 44 (emphasis added). The 1956 Convention defines the same term to mean "*not only Customs duties but also all duties and taxes whatsoever* chargeable by reason of importation." 20 U.S.T. 304 (emphasis added). There is no ambiguity here: the Conventions reach far beyond Customs duties.

Any doubt on that score is dispelled by *Japan Line*, which addressed a generally applicable state property

tax that was no more a Customs duty than the Tennessee levy at issue here. But the Court, explaining that "[t]he Convention reflects a national policy to remove impediments to the use of containers as 'instruments of international traffic,'" had no difficulty concluding that "California's tax * * * will frustrate attainment of federal uniformity." *Japan Line*, 441 U.S. at 453. The Court reached this conclusion, moreover, at the urging of the United States, which pointed to the 1956 Convention as establishing that "disparate state laws offend a perceived need for federal uniformity" (No. 77-1378, U.S. Br. 27 n.20)—and which concluded that the 1956 Convention preempted generally applicable state taxes: "In the instant case, a comprehensive arrangement of federal regulation has been adopted; *this arrangement precludes general state taxation* of foreign-owned instruments of commerce, and of sea-borne containers in particular." *Id.* at 22-23 (emphasis added). The government reasoned that the general state tax at issue "would frustrate accomplishment of a federal objective" (*id.* at 28) and therefore "conflict[] with the spirit and design of the federal scheme." *Id.* at 29 (footnote omitted). As the proscription on local regulation of containers has become considerably *stricter* since that time with the ratification of the 1972 Convention (see Pet. 18-19), the change in the United States' position is difficult to understand.

Equally curious is the government's failure to address *Xerox Corp.* v. *Harris County*, 459 U.S. 145 (1982), and *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), discussed in the petition (at 20-23), which respectively invalidated state sales and property taxes imposed on goods stored under bond in Customs bonded warehouses. As we explain in the petition (at 20), the statutes governing bonded warehouses, which were intended to encourage the use of American ports, in terms preclude the imposition only of Customs duties on such goods. The *Xerox* and *McGoldrick* Courts nevertheless struck down generally applicable state taxes, reasoning that "the purpose of the Congressional regulation of the commerce would

fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress." *McGoldrick*, 309 U.S. at 429. See *Xerox*, 459 U.S. at 153. Precisely the same analysis applies to the Container Conventions, which were intended to encourage the use of containers in international commerce. See Pet. 21. Indeed, despite its failure to identify the reasons for preemption here, the government recognized as much at the time of *Japan Line*, telling the Court that the bonded warehouse statutes are "analogous" to the 1956 Convention (No. 77-1378, U.S. Br. at 25) and concluding that "[t]he rationale of *McGoldrick* applies here as well." *Id.* at 27 (footnote omitted). We think that the United States got it right the first time.

C. The Import-Export Clause

Insofar as we understand its submission, the government opposes review of the Import-Export Clause question presented in the petition—which asks whether the Clause prohibits the imposition of state taxes on imports or exports while they are in transit—on the ground that containers that are brought into and shipped out of the United States are not imports or exports at all. Again, this is not the ground relied upon by the court below, which viewed *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), as holding the transitory character of the goods at issue to be immaterial and which proceeded to apply the *Michelin* test to Tennessee's tax. See Pet. 25-26. As a consequence, whatever the merits of the government's position on the status of containers as imports and exports, it plainly is incorrect in stating (at Br. 9) that the decision below does not conflict with *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), and *Louisiana Land & Exploration Co.* v. *Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), cert. denied, 111 S. Ct. 248 (1990), both of which found it fatal to a state sales tax that the goods were in transit

to a foreign country at the time the tax attached. See Pet. 23, 24-25.[4]

In any event, the government's contention—that a container is not protected under the Clause because it "*carries exports, but is not itself an export*" (Br. 11 (emphasis in original))—appears to have been weaved out of whole cloth. The only authority offered by the United States for its position, *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951), is self-evidently beside the point. There, the Court upheld a gross receipts tax imposed on revenues "derived from services" provided by a railroad in the form of switching, storage, wharfage, weighing, and providing a crane for use in loading and unloading. See *id.* at 512-513. Distinguishing *Richfield*, the Court explained that "[t]he difference is that in the present case the tax is not on the *goods* but on the *handling* of them at the port." *Id.* at 514 (emphasis in original). Here,

[4] The government does appear to hint that *Richfield* and *Louisiana Land* are distinguishable here, declaring that "[i]t is instructive to compare those two cases with *Joy Oil Co.* v. *State Tax Comm'n*, 337 U.S. 286 (1949), and *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949)." Br. 10. While we would never suggest that this Court's decisions are anything other than "instructive," we admit to some confusion at the government's point here. In both *Joy Oil* and *County of Merced*, the Court upheld the imposition of state property taxes on goods that were held in this country prior to export. In both cases, however, the Court emphasized that the goods "might have been diverted to domestic markets * * *. Neither the character of the property nor any event equivalent to its redelivery to a common carrier made export certain for all practical purposes." *Joy Oil*, 337 U.S. at 288. See *County of Merced*, 337 U.S. at 157 (goods "had not yet been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. * * * On the tax date the movement to foreign shores had neither started nor been committed"). Here, in contrast, the containers were not subjected to tax *until* they were delivered to a common carrier for transport overseas. And the "character" of the property made it certain that the containers would leave the country, since they obtained their duty-free status only upon Itel's undertaking that they would be used *exclusively* in international commerce. *Joy Oil* and *County of Merced* thus seem strongly to support Itel's position.

of course, the Tennessee sales tax is not imposed on any services provided by Itel, but directly on the containers. And as we explain in the petition (at 26), the Court has "always considered a tax on the sale of goods to be a tax on the goods themselves." *Department of Revenue* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 756 n.21 (1978).

Indeed, the government's position makes no logical sense. It cannot be dispositive that containers are used to facilitate the transport of other goods; the same is true of packaging materials, which inarguably may be imports or exports. Nor does it matter that the containers may return to this country; goods that are leased (rather than sold) for use across national borders are treated as imports or exports, even though they will return to the country of origin.[5] It thus is not surprising that containers, unlike the self-propelled airplanes and ships to which the government analogizes them (Br. 11), would be subject to federal Customs duties as imports were they not exempted by the Container Conventions. (That, of course, is the precise point of the Conventions.) The United States has offered no reason to believe that containers should be treated differently for purposes of the Import-Export Clause. As the government also does not deny that the issue presented here is an important and recurring one that this Court repeatedly has reserved, review plainly is warranted.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] Goods that are leased in foreign commerce may be treated as duty free imports by the Customs Service. See *Marposs Gauges Corp.* v. *United States*, 9 C.I.T. 193 (1985). And the United States treats goods leased in international commerce as export property for purposes of income taxation. See *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 391 n.1 (1984); 29 U.S.C. 993(a)(1)(B).

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